

Bah (Migration) [2018] AATA 5660 (14 December 2018)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Karmokoh Bah
VISA APPLICANT:	Miss Kadijatu Barrie
CASE NUMBER:	1720788
DIBP REFERENCE(S):	F2015/045994 OSF2015/045994
MEMBER:	Michael Cooke
DATE:	14 December 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa: • Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations • • Statement made on 14 December 2018 at 3:50pm

CATCHWORDS

MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – Public Interest Criterion 4020 – bogus document – school report not material to the application – compassionate or compelling circumstances to waive requirement – applicant remaining alone with no real parental guidance – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65
Migration Regulations 1994, Schedule 2, 117.223, Schedule 4, Public Interest Criterion 4020; 1.12

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Plaintiff M64/2015 v MIBP [2015] HCA 50
Shu v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 791
Singh v Minister for Immigration & Anor [2013] FCCA 1435
Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to s378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Immigration on 25 July 2017 to refuse to grant the applicant a Child (Migrant) (Class AH) visa under s.65 of the *Migration Act 1958* (the Act).
6. The applicant applied for the visa on 19 January 2015. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.117.223 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the applicant did not meet PIC 4020 as she submitted a bogus document being a school report..
7. The review applicant appeared before the Tribunal on 20 August 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sister. The Tribunal hearing was conducted with the assistance of an interpreter in the Krio and English languages.
8. The applicant's representative Michael Jones has provided a submission address the issues pursuant to PIC4020 in the case (T1, ff.57-58) as follows:

9. Reason for refusal — PIC 4020

10. The visa application of Ms Kadijatu Barrie for a class AH, subclass 117 visa was refused by a delegate of the Minister on the sole ground that the applicant had given a bogus document, being "School records issued by Kissy Municipal Junior Secondary School".

11. Bogus documents

12. It is submitted that the documents referred to by the delegate do not come within the meaning of the term "bogus document" now given in s 5 of the Act:

13. bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- purports to have been, but was not, issued in respect of the person; or
- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.

14. The evidence before the Tribunal is that the documents were obtained by a teacher at the school that the applicant actually attended, the Government Municipal Senior Secondary School which is in the vicinity of, or adjacent to, the other school.

15. In *Shu v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 791 the Federal Court held that the mere fact that a document contains false information does not bring it within the definition of a bogus document. In that case the Court was considering work references that had been knowingly provided by an employer containing false information about the applicant's work record. It found that the references did not come within any of the three limbs of the definition. A similar

view was taken by the Federal Circuit Court in *Singh v Minister for Immigration & Anor* [2013] FCCA 1435.

16. It is most likely that in this case the teacher had some connection with the other school which enabled him to have the documents issued by that institution containing false information about Ms Barrie's enrolment.

17. PIC 4020(1) is engaged either by the provision of a bogus document or of "information that is false or misleading in a material particular" [*emphasis added*]. It is not disputed that the information contained in the documents was false, but in our submission it was not in any way material to the application for a subclass 117 visa.

18. If the Tribunal finds that PIC 4020(1) was not engaged in this case, then the decision should be remitted to the Minister for further consideration with a direction to that effect.

19. **Discretion**

20. Should the Tribunal not agree with the above submissions, then we submit that there are compassionate or compelling circumstances that affect the interests of an Australian citizen or permanent resident in this case that justify waiver under 4020(4).

21. The relevant citizens or permanent residents in this case are the applicant's brother, Mr Karmokoh Bah, and their sister, Ms Yoro Barrie.

22. Mr Bah is the sponsor in this case. He came to this country [deleted] from [deleted] Sierra Leone and has been an Australian citizen since 2009. Due to the chaotic circumstances of his childhood he was not even aware of his real parents' identities, that they were deceased, or of the fact that he had brothers and sisters. After learning the truth, he was able to sponsor his two younger sisters and a brother as orphan relatives. The overseas post said that the application was received one day after Ibrahim turned 18. Yoro was approved, but Kadijatu was refused only because of the PIC 4020 issue.

23. Yoro, now 14, is the youngest child of the family. Since discovering the truth about his background Mr Bah has made it his mission in life to provide a better life for his younger siblings. In Sierra Leone Kadijatu had been a mother figure to Yoro, and Mr Bah asserts that Yoro's welfare in Australia depends on having her older sister come here to provide that support. Mr Bah himself is reliant on employment as a "fly in, fly out" worker on mining sites and is not in a position to properly care for Yoro himself. He is also deeply distressed at the prospect that his one remaining sister may be left alone in Sierra Leone and may be at risk of being forced into an unwanted marriage.

24. The review applicant sponsor has also provided a personal submission (T1, ff.60-62 and 54-56).
25. The review applicant was represented in relation to the review by his registered migration agent. The representative attended the Tribunal hearing.
26. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

27. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.117.223 for the grant of the visa. Broadly speaking, this requires that:
- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
28. The requirements in PIC 4020(1) and (2) can be waived if there are certain 'compelling or compassionate reasons justifying the granting of the visa': PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

29. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
30. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
31. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

32. **Findings and reasons about:**

whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:

- a 'bogus document', as defined in s.5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or
 - is counterfeit or has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly.

and/or

- 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is:
 - false or misleading at the time it is given, and
 - relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

33. in relation to the visa application or a visa held in the 12 months before the visa application was made.

34. The Tribunal is of the view that the school report was a bogus document because an 'element of fraud or deception by some person is necessary to attract the operation of the provision': *Trivedi v MIBP* [2014] FCAFC 42. According to the sponsor the applicant was aware of the 'element of fraud or deception' because as he states in his submission in paragraph 11:

35. I called Kadijatu on the 20/06/18 to find out exactly as to why the result was not the right one. She told me that when I ask her to provide a result from her school, she said, she told her teacher to provide her report card. Which the teacher acknowledges to. The teacher then asks her why she needs the result. She told him that, that her brother is putting a program for her to go to Australia. So, the teacher told her to give him few days, so he can have organised to provide the result for her.

36. ***After 3 days the teacher called her in his office and suggested that It will be great if they can provide a result from the other school which is doing great, would look good as well when they provide that to the Australian government.***

37. ***At first, she said no. but the teacher convinces her that he has ask other people about it and they have give him advice that it will be best off doing it that way. So, she agreed as she was struggling a lot academic wise and the standard of living. As she wanted to come to Australia so badly that she was not thinking.***

38. ***The result came out and she never told me what she has done because she got advice from elder people that I might be so angry if I found.*** I might even

cancel the program as we never grow up together. other people that know me told her that I hate when someone lies. And that I will stop talking to her. She said with all those stuffs playing in her mind, that's why she never told me it was bogus and that she never wanted to lose a brother who she never knows existed until 2010.

39. Therefore, the Tribunal is satisfied that the applicant **does not meet** PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

40. The requirements of PIC 4020(1) and (2) may be waived where there are 'compelling circumstances that affect the interests of Australia', or where there are 'compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa'. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
41. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
42. For the following reasons, the Tribunal is satisfied that the requirements should be waived.
43. **Findings and reasons about whether there are 'compelling circumstances that affect the interests of Australia', or 'compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa' and ground waiver of PIC4020.**
44. The Tribunal takes note of submission containing 'compassionate or compelling circumstances that affect the interests of an Australian citizen' being the sponsor and who also has two other siblings living with him. In his representative's submission it is suggested that the school report 'was not in any way material to the application for a subclass 117 visa' in the sense of meeting the criteria for the visa – the subject of this review. This may be. The school report established she was a school student (as she was) but at the neighbouring school rather than the one she claimed to attend.
45. The deception (it is argued) was basically the actions of a teacher she approached who had a 'great idea at the time' to 'help' her with her desire to re-join her family in Australia. Whilst the applicant was not guilty of 'gross moral turpitude' nevertheless her actions in acquiescing in the teacher's 'element of deception' was wrong because the information contained in the documents was false. The fact that she may have been importuned into this by an adult in authority does not diminish the fact that the migration program is not meant to be impugned by false or bogus documentation. Hence the finding that she has breached PIC4020.
46. Essentially the bogus document proffered was a product of some school teacher who thought that giving the applicant a scholastic advantage by claiming she attended a better achieving school would 'buff up' her visa application by seemingly impressing Department officers. This school (Kissy Municipal Junior School) was adjacent to the one used by the applicant (Government Municipal Senior Secondary School - Kissy Dockyard). The applicant required the basic secondary school certificate of attendance. She approached the teacher to secure the said certificate for migration purposes. The teacher she approached then asked why she wanted the certificate and she explained her reason. The teacher then

offered to give her a certificate from the nearby school which appears to have had a better scholastic reputation. This act of misplaced kindness/deception had fatal consequences at Departmental level for the applicant because the certificate previously submitted contradicted the one provided by the teacher and the Department found out in its processing of her case. It should be noted in passing that documentation from West Africa is notoriously suspect.

47. The reality of the applicant's life is that as a consequence of being found to breach PIC4020 she has been left by circumstance in her homeland while her other sister and brother have already migrated to join their Australian citizen brother (the sponsor). She has had no real parental guidance. Her Australia-based sponsor brother was not 'Johnny on the spot' and in no position geographically to give her instant moral guidance or sane advice. He has expressed the anger he felt towards her for her stupidity in taking up the teacher's offer and compromising his anticipated family reunion.
48. The Tribunal realizes that the only family member who remains in Africa is the applicant. Due to her immaturity and being importuned by an adult in authority to provide a bogus document to the Department she has ended up in an invidious situation. She has been prevailed upon by that adult in authority to acquiesce in falsified documentation under trying circumstances ostensibly to get a good outcome. The Tribunal is satisfied that what she did was wrong but not heinous under the mitigating circumstances. Her age and unfortunate family situation moreover evoke a 'compassionate circumstance' in the instant case as far as the Tribunal is concerned.
49. The sponsor has told of the difficulty he faces as a fly in/fly out regional employee. He is really struggling to care for his siblings who he discovered late in life due to the vicissitudes of war and displacement in West Africa. The presence of the applicant is necessary both from a family point of view because they all want to be together. More importantly the family needs the applicant to assist them with re-ordering their lives in Australia and establishing a common purpose.
50. The Tribunal finds this latter consideration to be a 'compelling circumstance' that affects the interests of an Australian citizen, as it is a 'forceful' and 'powerful' circumstance. When the other 'compassionate circumstance' is factored into the mix the Tribunal is satisfied that together the 'circumstances' do 'justify the grant of the visa' and thus grant waiver of PIC4020.
51. Therefore, the requirements of PIC 4020(1) **should** be waived.

Has the applicant satisfied the identity requirements?

52. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal that she has not done so.
53. Therefore, the Tribunal finds that the applicant **meets** PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

54. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

55. The Tribunal finds no evidence that the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A);
56. Therefore, the Tribunal finds that PIC 4020(2B) **is met**.
57. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.117.223.

DECISION

58. The Tribunal remits the application for a Child (Migrant) (Class AH) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 117 (Orphan Relative) visa:
 - Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to

Michael Cooke
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...